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14 **UNITED STATES BANKRUPTCY COURT**

15 **DISTRICT OF NEVADA**

16 In re:

17 LAS VEGAS MONORAIL COMPANY,  
18 A Nevada non-profit corporation,

19 Debtor.

Case No. 10-10464-BAM

CHAPTER 11

Hearing Date: TBD  
Hearing Time: TBD

20 **MOTION OF THE INDENTURE TRUSTEE AND MAJORITY**  
21 **1<sup>st</sup> TIER BONDHOLDERS FOR AN ORDER TERMINATING EXCLUSIVITY**

22 Wells Fargo Bank, N.A., in its capacity as indenture trustee (the “Indenture Trustee”)  
23 under a Senior Indenture (the “Senior Indenture”) dated September 1, 2000, issued by the Director  
24 of the State of Nevada Department of Business and Industry (the “Director”) with respect to Las  
25 Vegas Monorail Project Revenue Bonds 1<sup>st</sup> Tier Series 2000 (the “1<sup>st</sup> Tier Bonds”) and the  
26 majority of the holders of the 1<sup>st</sup> Tier Bonds (the “Majority 1<sup>st</sup> Tier Bondholders” and collectively

1 with the Indenture Trustee, “Movants”),<sup>1</sup> by their undersigned counsel, move pursuant to 11  
 2 U.S.C. §§ 105 and 1121(d) for a order terminating Debtor’s (“Debtor” or “LVMC”) exclusive  
 3 periods to file a plan and solicit acceptances (the “Motion”). Pursuant to the Court’s Order  
 4 Extending Exclusivity dated May 10, 2010 [DE 367], this motion is to be considered as an  
 5 objection to the Debtor’s prior Exclusivity Motion [DE 335], and is to be heard on not less than  
 6 ten days’ notice.

#### Preliminary Statement

7       The 1<sup>st</sup> Tier Bondholders are far and away the principal constituency in this case, holding  
 8 *more than 99%* of all claims entitled to vote on the Debtor’s plan of reorganization [DE 516] (the  
 9 “Plan”). Remarkably, however, the Debtor has refused to engage in good-faith negotiations with  
 10 the 1<sup>st</sup> Tier Bondholders, through the Indenture Trustee and the Majority 1<sup>st</sup> Tier Bondholders.  
 11 Instead, the Debtor waited 216 days and then filed a Plan that it knew was fundamentally  
 12 unacceptable to the 1<sup>st</sup> Tier Bondholders – a Plan that fails to maximize creditor recoveries and  
 13 that, on its face, cannot be confirmed over the opposition of the 1<sup>st</sup> Tier Bondholders. In short, the  
 14 Debtor has done precisely what the Bankruptcy Code’s exclusivity provisions are meant to  
 15 discourage. The Debtor’s “take it or leave it” approach, the facial unconfirmability of its Plan,  
 16 and – perhaps most important of all – the fact that its Plan is adamantly opposed by creditors  
 17 holding more than 99% of all voting claims constitute clear “cause” to terminate Debtor’s  
 18 exclusive period to file and solicit acceptances of a plan.

19       At bottom, the Plan elevates management’s goals over the Debtor’s duty to maximize the  
 20 recoveries of creditors, specifically the 1<sup>st</sup> Tier Bondholders that hold virtually all of the in-the-  
 21 money debt. The Plan permits the Debtor to keep over \$26.6 million of Net Project Revenues, for

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22       <sup>1</sup> In addition to the Indenture Trustee, this Motion is filed on behalf of the following Majority 1<sup>st</sup> Tier  
 23 Bondholders: Eaton Vance Municipal Income Trust, Eaton Vance Municipal Bond Fund, Eaton Vance  
 24 Municipal Bond Fund II, Nuveen Asset Management, investment adviser, on behalf of the Nuveen  
 25 municipal bond funds, Restoration Capital Management, LLC, as Investment Advisor for Restoration  
 26 Holdings Ltd and Restoration Special Opportunities Master Ltd, and Stone Lion Portfolio LP.  
 Collectively, these bondholders hold at least 75% of the 1<sup>st</sup> Tier Bonds. A statement under Rule 2019 will  
 be filed in due course.

1 management to use in its unfettered discretion, in clear contravention of the financing documents,  
 2 which were set up to ensure that every dollar of revenue generated by LVMC after operating  
 3 expenses would be used to repay the hundreds of millions of dollars of bond debt that were used  
 4 to build the Las Vegas Monorail (the “Monorail”). The Plan gives the Debtor’s management a  
 5 continuous fund of \$3 million of “working capital,” which the Debtor projects will result in a  
 6 \$26.6 million pot of Net Project Revenues by the time the Monorail Operations and Maintenance  
 7 Agreement dated September 1, 2000 expires in 2019. At the same time, the Plan extinguishes the  
 8 Indenture Trustee’s statutory lien on Net Project Revenues and setoff rights in the Debtor’s bank  
 9 accounts and eliminates all financial controls over operating and capital expenditures.

10 If the 2019 replacement Monorail O&M contract with Bombardier is cost-effective and the  
 11 capital expenditures are low enough to generate Net Project Revenues thereafter, as may well be  
 12 the case, the resulting value should go to the 1<sup>st</sup> Tier Bondholders, as the true owners of the  
 13 business. The Plan, however, permits LVMC’s reallocation of potential future value away from  
 14 the 1<sup>st</sup> Tier Bondholders and allows management to undertake speculative endeavors with no  
 15 accountability to creditors. The Plan allows LVMC’s management (1) to elevate the payment of  
 16 capital expenditures (for potential Monorail expansion or anything else they want to spend it on)  
 17 above payment of bond debt without bondholder consent, (2) to cut the term of the bond debt by  
 18 over 20 years, when what LVMC should be doing is extending out payments on the bond debt to  
 19 the maximum possible term (*i.e.*, 2107, the year the Franchise Agreement expires), and (3) does  
 20 so by having the Director amend the Financing Agreement over the 1<sup>st</sup> Tier Bondholders’  
 21 objections, which simply cannot be done. Serious defects in the Debtor’s proposed “amended  
 22 documents” also jeopardize the tax exempt status of the 1<sup>st</sup> Tier Bonds and potentially interfere  
 23 with the Indenture Trustee’s claims against Ambac Assurance Corporation (“Ambac”), while  
 24 conferring no benefit on the Debtor.

1        In short, the Plan fails to give the 1<sup>st</sup> Tier Bondholders – the Debtor’s only substantial  
 2 economic stakeholders<sup>2</sup> – any of the potential upside for keeping the Monorail running past 2019  
 3 by vastly undervaluing the Monorail. The Plan also fails to give bondholders fair value under the  
 4 current priority scheme of the financing documents – and, in fact, the Bankruptcy Code – by  
 5 hoarding an estimated \$26.6 million or more that will not in any way benefit bondholders. It is  
 6 premised on a Director action that will not occur. It imposes significant risks on 1<sup>st</sup> Tier  
 7 Bondholders’ rights and remedies, which LVMC’s management ignored after explicit  
 8 recommendations for protection.

9        The Indenture Trustee and the Majority 1<sup>st</sup> Tier Bondholders, who collectively represent at  
 10 least 75% of the holders of 1<sup>st</sup> Tier Bonds, will not agree to such a Plan, rendering it patently  
 11 unconfirmable. Among other things, the Plan does not contain a legally created impaired  
 12 accepting class, but merely a gerrymandered class of trade creditors that should either be paid in  
 13 full (which, under the Debtor’s estimates, could be accomplished with a mere additional \$25,000)  
 14 or should be treated *pari passu* with other unsecured creditors – which would give them an  
 15 approximate 1% recovery under the Debtor’s best estimates.

16        Terminating exclusivity and allowing the Indenture Trustee and the Majority 1<sup>st</sup> Tier  
 17 Bondholders to file their own plan is the best way to move this case forward. This is not a case  
 18 where a small group of dissident creditors seeks to terminate exclusivity. The 1<sup>st</sup> Tier  
 19 Bondholders are entitled to be paid 99.97% of the value of this estate, and Debtor has proven itself  
 20 incapable of proposing a plan that is supported by these creditors. The Indenture Trustee and the  
 21 Majority 1<sup>st</sup> Tier Bondholders must be permitted to file their own plan, which they are prepared to  
 22 file promptly upon the termination of exclusivity.

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23  
 24       <sup>2</sup> No other parties in this case have economic interests that are even remotely comparable in size to those of  
 25 the 1<sup>st</sup> Tier Bondholders. The interests of the 2<sup>nd</sup> and 3<sup>rd</sup> Tier Bondholders are subordinated to those of the  
 26 1<sup>st</sup> Tier Bondholders and, as a result, will not be paid. Ambac’s rights as bond insurer include certain  
 subrogation rights, but only to the extent that Ambac honors valid claims on the Surety and Municipal  
 Bond Insurance Policy. The claims of all other general unsecured creditors amount to less than 1% of the  
 claims of the 1<sup>st</sup> Tier Bondholders.

### **Jurisdiction and Venue**

The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. § 1408. The predicates for relief requested herein are sections 105 and 1121 of the Bankruptcy Code.

## **Background**

On January 13, 2010 (the “Petition Date”), Debtor filed a voluntary petition for relief under chapter 11 of Title 11 of the United States Bankruptcy Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Nevada.

On April 21, 2010, Debtor filed a motion (the “Exclusivity Motion”) seeking to extend the exclusive period to file a plan and solicit acceptances thereof through August 17, 2010 [DE 335].

On May 7, 2010, Debtor and Indenture Trustee entered into a stipulation (the “Exclusivity Stipulation”) for a limited extension of exclusivity. [DE 365]. Specifically, the Indenture Trustee agreed not to object to the Exclusivity Motion, provided that:

if a plan acceptable to the [Indenture] Trustee is not filed by June 11, 2010, or some later date agreed to by the Debtor and the [Indenture] Trustee in writing, the [Indenture] Trustee reserves the right to object to continuation of the exclusivity period and to seek an expedited hearing on a motion to reconsider the exclusivity extension on ten (10) days written notice. The Debtor agrees that such motion will be heard and considered as an objection to the Exclusivity Motion, without the obligation to meet additional requirements of Bankruptcy Rule 9023 or 9024.

On May 10, 2010, the Court entered an order approving the Exclusivity Stipulation [DE 367].

During the course of plan negotiations, Debtor and the Indenture Trustee entered into five amendments to the Exclusivity Stipulation. The order granting the fifth amendment (entered on August 9, 2010) provided that Debtor would file a plan by August 17, 2010, absent further extension of the exclusivity period [DE 514].

On May 25, 2010, Debtor provided counsel to the Indenture Trustee with an initial draft of plan of reorganization. The Indenture Trustee and the Majority 1<sup>st</sup> Tier Bondholders had significant concerns about the draft plan. The Indenture Trustee exhaustively analyzed the draft

1 plan and provided lengthy comments on ways that the draft could be revised to protect the 1<sup>st</sup> Tier  
 2 Bondholders and advance the goal of a consensual plan (“Indenture Trustee’s Comments”). See  
 3 Declaration of Gavin Wilkinson in Support of Indenture Trustee’s Motion to Terminate the  
 4 Exclusivity Period to Confirm a Chapter 11 Plan, filed contemporaneously with this motion.<sup>3</sup> In  
 5 the opening paragraphs of the Indenture Trustee’s Comments, counsel to the Indenture Trustee  
 6 explained the Indenture Trustee’s broad objectives:

7           *Proposed Deal Points.* In our opinion, in order for the holders of the Series 2000  
 8 Bondholders to support a Plan from LVMC, at a minimum, such a Plan will have  
 9 to be reasonably expected to accomplish the following objectives:

10           A.     Preservation of the rights of Bondholders under the Surety Bond  
 11 and the Policy;

12           B.     Capture of a meaningful portion of any future increase in the value  
 13 of LVMC as an ongoing enterprise;

14           C.     Exclusion of interest (and accreted value) on the Series 2000 Bonds  
 15 from gross income for federal income tax purposes; and

16           D.     Creation of security and sources of payment that will provide the  
 17 Bondholders with some assurance that future income streams from LVMC will  
 18 not be vulnerable to manipulation or challenge.

19           With these business objectives in mind, we focused our comments on developing  
 20 an integrated series of proposals, organized by each of the financial instruments  
 21 discussed in the Draft Plan. The purpose in presenting our comments in this form  
 22 is to encourage LVMC and the other participants to engage in a focused dialogue  
 23 about the details of the restructured financing prior to submitting the Plan for a  
 24 vote.

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25           <sup>3</sup> Movants are not seeking to disclose settlement proposals, to the extent referenced in Exhibit A to the  
 26 Wilkinson Declaration, for any reason other than to show a breakdown in negotiations warranting the relief  
 sought by the Movants. Federal Rule of Evidence 403(b). The Movants are also by no means seeking to  
 solicit rejection of the Debtor’s Plan before Disclosure Statement approval or to accept an alternative plan,  
 contrary to 11 U.S.C. § 1125(b). *See Jacobson v. AEG Capital Corp.*, 50 F.3d 1493, 1500 (9th Cir. 1995)  
 (“bankruptcy courts have given interested parties wide latitude to ‘float’ (as opposed to solicit votes for)  
 alternative plans”); *Century Glove v. First American Bank of New York*, 860 F.2d 94 (3<sup>rd</sup> Cir. 1988). To  
 avoid any questions on these grounds, the Movants are seeking to file Exhibit A under seal. The Movants  
 may likewise submit to the Court their term sheet for an alternative plan under seal.

1       On July 22, 2010, the Debtor and its legal and financial advisors met with representatives  
 2 of the Indenture Trustee, the Majority 1<sup>st</sup> Tier Bondholders and Ambac<sup>4</sup> in Chicago to discuss the  
 3 draft plan and concerns of parties in interest.

4       On August 5, 2010, the Debtor provided counsel to the Indenture Trustee and the Majority  
 5 1<sup>st</sup> Tier Bondholders a revised draft plan. The Indenture Trustee and the Majority 1<sup>st</sup> Tier  
 6 Bondholders found that the revised draft plan contained very few changes and virtually ignored  
 7 the Indenture Trustee Comments and the concerns raised at the July 22, 2010 meeting.

8       The Debtor did not respond to messages or efforts to communicate about the revised draft,  
 9 and instead filed the Plan on August 17, 2010, which retreated from the previous drafts in an  
 10 apparent effort to cram down the Plan on the 1<sup>st</sup> Tier Bondholders. *Id.* In effect, the Debtor has  
 11 failed to establish a relationship with the 1<sup>st</sup> Tier Bondholders conducive to meaningful plan  
 12 negotiations.

13 ***Financing Structure with the 1<sup>st</sup> Tier Bonds***

14       As this Court is aware, Clark County, Nevada, granted a franchise to operate the Monorail  
 15 pursuant to the Clark County Monorail Franchise Agreement dated December 2, 1998, as  
 16 amended (the “Franchise Agreement”). The rights under the Franchise Agreement, which are  
 17 now held by LVMC, authorize LVMC to charge and collect fares from passengers, display  
 18 advertising, establish concessions, and lease space on the monorail through December 31, 2107.  
 19 Franchise Agreement at § 2.1. In addition, the Franchise Agreement grants LVMC the exclusive  
 20 right to extend the Monorail to McCarran International Airport.

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21  
 22       <sup>4</sup> Ambac is the insurer of the bonds. On March 21, 2010, Ambac established a segregated account (the  
 23 “Segregated Account”) exclusively to respond to claims arising under certain policies and contracts,  
 24 including the insurance policy supporting the 1<sup>st</sup> Tier Bonds. The Segregated Account is currently in  
 25 rehabilitation proceedings in Wisconsin and Ambac has defaulted on making interest payments due to the  
 26 1<sup>st</sup> Tier Bondholders under the terms of the insurance policy. At this point in time, the Movants take no  
 position with respect to their rights against Ambac under the Senior Indenture or the insurance policy.  
 Movants believe that that Ambac’s concerns on the economics of the Plan mirror those of the Movants,  
 while understanding that Ambac may have different concerns about certain provisions or mechanics of the  
 Plan.

1        In 2000, the Director issued tax-exempt bonds to finance the construction and operation of  
 2 the Monorail. The 1<sup>st</sup> Tier and 2<sup>nd</sup> Tier Bonds were issued pursuant to the Senior Indenture and  
 3 the 3<sup>rd</sup> Tier Bonds were issued pursuant to a Subordinate Indenture. The Director simultaneously  
 4 lent the bond proceeds to LVMC under a Financing Agreement to fund the construction of the  
 5 Monorail, and assigned the its right, title and interest in Financing Agreement to the respective  
 6 Indenture Trustees as security for payment under the various indentures.

7        The Financing Agreement granted a security interest to Director in, and acknowledged the  
 8 pledge to the Indenture Trustee of, the following:

- 9        • Contract rights of the Debtor under all of the Debtor's substantial operating agreements,  
 10 including the Franchise Agreement, Purchase Agreement, the Design-Build Agreement,  
             the Operating and Maintenance Agreement and Management Agreement;
- 11        • "Net Project Revenues" (defined in the Senior Indenture as "Project Revenues" minus  
 12 "Operation and Maintenance Costs"); and
- 13        • All amounts held in any funds or accounts created under the Senior or Subordinate  
             Indentures, all money and funds earned or accrued on any deposit of Net Project  
             Revenues, and related collateral serving as proceeds.

15        Section 2.1(c) and 3.1(b) of the Financing Agreement. All Project Revenues, and thus all Net  
 16 Project Revenues, are required to be maintained in accounts in which the Indenture Trustee holds  
 17 a perfected security interest. See, the Court's cash collateral opinion recognizing the Indenture  
 18 Trustee's statutory lien on all Net Project Revenues, and the Debtor's obligation to maintain them  
 19 at Wells Fargo Bank. [DE 342 at 12-14 & n. 18, 24, 26, 35].

20        Pursuant to Section 4.1(c) of the Financing Agreement, LVMC maintains a Capital  
 21 Replacement Fund, intended to cover capital expenditures and capital replacements. LVMC (and  
 22 after an event of default, pursuant to Section 4.1(b) of the Financing Agreement, the Indenture  
 23 Trustee) is permitted to transfer funds into the Capital Replacement Fund to pay for capital  
 24 expenditures in accordance with its annual budget, but only after the Borrower has paid all debt  
 25 service due and owing on the 1<sup>st</sup> Tier Bonds (as well as the 2<sup>nd</sup> and 3<sup>rd</sup> Tier Bonds), as well as  
 26 operation and maintenance costs.

1       Because LVMC has failed to make debt service payments on the bonds as and when due,  
 2 the Capital Replacement Fund contains \$0. Under the terms of the Financing Agreement and  
 3 Section 5.03 of the Senior Indenture, no monies are or will be available to pay capital  
 4 expenditures until all payments due and owing on the bonds are paid in full.

5 ***The Plan***

6       The Plan seeks to solicit acceptances only from three groups of creditors:

- 7       • (1) The 1<sup>st</sup> Tier Bondholders, holders of approximately \$500 million in claims, who will  
   8 receive a distribution consisting of \$18.5 million in notes maturing in 2019 (yielding a  
   recovery of 3.6%);
- 9       • (2) General Unsecured Creditors, holders of approximately \$150,000 to \$175,000 in  
   10 claims, who will receive their pro-rata share distribution of a \$175,000 cash pool (yielding  
   a recovery of 80% - 100%); and
- 11      • (3) The Director, holder of an unknown amount of claims based on certain indemnification  
   12 obligations under the Financing Agreement not part of the 1<sup>st</sup> Tier, 2<sup>nd</sup> Tier or 3<sup>rd</sup> Tier  
   13 Bond Claims, who will participate in distributions to the 1<sup>st</sup> Tier Bondholders as provided  
   claims are being paid and these claims may well be non-existent.<sup>5</sup>

14       In addition to the voting classes noted above, the 2<sup>nd</sup> Tier Bond Claims (totaling  
 15 \$158,749,493.40) and the 3<sup>rd</sup> Tier Bond Claims (totaling \$48,500,000) will receive no distribution  
 16 under the Plan. Because the 2<sup>nd</sup> Tier and 3<sup>rd</sup> Tier Bonds are contractually subordinated to the 1<sup>st</sup>  
 17 Tier Bonds, any recoveries to these classes would be required to be turned over to the 1<sup>st</sup> Tier  
 18 Bondholders. The senior and subordinate bonds collectively represent 99.97% of Debtor's debt.

19       Critically, the Plan provides a "set aside" of approximately \$26.6 million through 2019,  
 20 (*see* Statement of Cash Flows, attached as Exhibit C to the Disclosure Statement) that will be used  
 21 as LVMC sees fit, presumably for capital improvements on the Monorail or Monorail expansion  
 22 after the new \$18.5 million in notes are repaid by LVMC.

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23  
 24  
 25      <sup>5</sup> Page 12 of the Disclosure Statement estimates the Director Claims at \$0, although the liquidation analysis  
 26 (attached as Exhibit B to the Disclosure Statement) provides that the estimated claim amounts and plan  
   recovery for the Director Claims is "TBD."

The Plan also impermissibly attempts to extinguish the Indenture Trustee's protections of its statutory lien on Net Project Revenues and setoff rights in Debtor's bank accounts and ends financing controls over operating and capital expenditures.

## Argument

### **Cause Exists To Terminate Exclusivity**

Pursuant to Section 1121(d)(1) of the Bankruptcy Code, courts may reduce the exclusivity period on a showing of “cause.” *See Geriatrics Nursing Home v. First Fidelity Bank, N.A. (In re Geriatrics Nursing Home)*, 187 B.R. 128, 132 (D.N.J. 1995); *In re Sharon Steel Corp.*, 78 B.R. 762, 763 (Bankr. W.D. Pa. 1987).

While the term “cause” is not defined in the Bankruptcy Code, courts addressing the issue have looked to a variety of factors in determining whether cause exists. The factors include: (1) the size and complexity of the case; (2) the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information; (3) the existence of good faith progress toward reorganization; (4) the fact that the debtor is paying its bills as they become due; (5) whether the debtor has demonstrated reasonable prospects for filing a viable plan; (6) whether the debtor has made progress in negotiations with its creditors; (7) the amount of time which has elapsed in the case; (8) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor’s reorganization demands; and (9) whether an unresolved contingency exists. *In re Adelphia Commc’ns. Corp.*, 352 B.R. 578, 587 (Bankr. S.D.N.Y. 2006); *In re Dow Corning*, 208 B.R. 661, 663 (E.D. Mich. 1997).

Although courts consider many factors, the primary consideration in determining whether “cause” exists to terminate exclusivity is whether doing so would facilitate moving the case forward. *See In re Dow Corning Corp.*, 208 B.R. 661, 670 (Bankr. E.D. Mich. 1997) (noting that “[w]hen the Court is determining whether to terminate a debtor’s exclusivity, the primary concern should be whether or not doing so would facilitate moving the case forward. And that is a practical call that can override a mere totting up of the factors”); *see also In re Henry Mayo*

1      *Newhall Mem'l Hosp.*, 282 B.R. 444, 453 (B.A.P. 9th Cir. 2002) ("We also agree with the *Dow*  
 2      *Corning* court that a transcendent consideration is whether adjustment of exclusivity will facilitate  
 3      moving the case forward toward a fair and equitable resolution").

4           As discussed below, the Debtor has demonstrated an inability to negotiate with its key  
 5      creditors and formulate a confirmable plan of reorganization. Rather than advancing these cases,  
 6      it is clear that maintaining the Debtor's exclusive period to file and solicit acceptance of a plan  
 7      will only cause increased delay while minimizing recoveries to creditors. The Debtor's actions to  
 8      date demonstrate "cause" to terminate exclusivity.

9           **A.      Terminating Exclusivity Will Move the Case Forward**

10        As noted by this Circuit's BAP, the key question in determining whether "cause" exists to  
 11      terminate exclusivity is whether "extension of exclusivity function[s] to facilitate movement  
 12      towards a fair and equitable resolution of the case, taking into account all the divergent interests  
 13      involved." *In re Henry Mayo Newhall Mem'l Hosp.*, 282 B.R. at 453. The Plan will impede,  
 14      rather than expedite, the Debtor's emergence from bankruptcy.

15        The Indenture Trustee and the Majority 1<sup>st</sup> Tier Bondholders – representing over 99% of  
 16      creditors entitled to receive a distribution from the Debtor – will oppose the Plan, which provides  
 17      the 1<sup>st</sup> Tier Bondholders with a minimal distribution while retaining excess cash for LVMC going  
 18      forward. This Court should allow the Debtor's creditors to consider an alternate plan that will  
 19      provide materially more value, while granting the key creditors the right to direct the future of  
 20      LVMC.

21           **B.      The Debtor Has Not Made Progress in Negotiating with Creditors and is  
 22      Using Exclusivity to Pressure Creditors**

23        The Debtor has not made progress in negotiating an acceptable plan with its creditors, and  
 24      is not attempting to do so. The Debtor took a first step, as promised in its stipulation with the  
 25      Indenture Trustee to extend exclusivity, by circulating a draft plan in May 2010. However, it  
 26      became evident that the Debtor had no interest in engaging in meaningful negotiations with its

1 major constituency when it circulated a revised draft plan that ignored or contradicted the  
 2 Indenture Trustee's Comments and disregarded the critical issues raised during the July 2010 plan  
 3 discussion meeting.

4 Despite this apparent breakdown in communication, the Majority 1<sup>st</sup> Tier Bondholders and  
 5 Indenture Trustee were open to continuing the dialogue and negotiations and were amenable to a  
 6 further limited extension of the exclusive periods to allow for meaningful negotiations. Instead of  
 7 communicating with the Indenture Trustee or responding to messages, the Debtor either chose to  
 8 proceed with a placeholder plan designed to publicly pressure the Majority 1st Tier Bondholders  
 9 to capitulate to Debtor's demands, or the Debtor thinks it can actually cram down the Plan on  
 10 them (which is unlikely, since the Debtor has competent bankruptcy counsel to advise it).

11 It is hornbook law that the filing of a cramdown plan constitutes, at minimum, a  
 12 substantial factor favoring the termination of exclusivity:

13 In such cramdown situations, exclusivity should be terminated even before the expiration  
 14 of the 180-day acceptance period.

15 7 COLLIER ON BANKRUPTCY ¶ 1121.05[3] (16th ed. 2010); *accord*, e.g., *In re Dow Corning Corp.*,  
 16 208 B.R. 661, 670 (Bankr. E.D. Mich. 1997) (condemning the filing of "placeholder" plans that  
 17 are merely intended to retain control over the plan process); *In re Grossinger's Associates*, 116  
 18 B.R. 34, 36 (Bankr. S.D.N.Y. 1990) (exclusivity terminated where it was obvious that debtor filed  
 19 a plan to meet the statutory exclusivity deadlines and the plan did not offer any "serious  
 20 reorganizational possibilities"). This principle applies with particular force in this case – where  
 21 the creditors that the Debtor is proposing to cram down constitute far and away the largest  
 22 economic stakeholders, and cramdown serves the interests only of management, not of any  
 23 creditor constituency.

24 In such case, the termination of exclusivity is necessary to "avoid allowing the debtor to  
 25 hold creditors and other parties in interest 'hostage' so that the debtor can force its view of an  
 26 appropriate plan upon the other parties." *In re Public Serv. Co. of New Hampshire*, 88 B.R. 521,

1 537 (Bankr. D.N.H. 1988); *see also In re Timbers of Inwood Forest Assocs., Ltd.*, 808 F.2d 363,  
 2 372 (5th Cir. 1987), *aff'd*, 484 U.S. 365 (1988) (noting that Congress designed section 1121 to  
 3 strike a balance between the debtor's ability to contract the process of proposing a reorganization  
 4 plan with a creditor's or equity holder's right to "limit the delay that makes creditors the hostages  
 5 of Chapter 11 debtors"); *In re Hoffinger Industries, Inc.*, 292 B.R. 639, 643 (8th Cir. B.A.P. 2003)  
 6 (relying on the Senate Report to the 1978 Bankruptcy Act, stating that "[a]n extension should not  
 7 be employed as a tactical measure to put pressure on parties in interest to yield to a plan they  
 8 consider unsatisfactory." S. Rep. No. 95-989, 95th Cong. 2d Sess. 118 (1978), U.S. Code Cong. &  
 9 Admin. News 1978 p. 5904).

10 As noted above, the Indenture Trustee and the Majority 1<sup>st</sup> Tier Bondholders were  
 11 receptive to continuing negotiations to develop an acceptable plan, even after Debtor ignored their  
 12 concerns. The Debtor's precipitous filing of the Plan constitutes the kind of "hostage taking"  
 13 condemned by the Senate Report and is cause for the termination of exclusivity.

14 **C. The Plan Does Not Provide the Greatest Recovery to Creditors**

15 The Debtor's exclusive period to file and solicit acceptances of a plan should be  
 16 terminated to permit the Indenture Trustee and Majority 1<sup>st</sup> Tier Bondholders to file an alternative  
 17 plan that provides a greater recovery to creditors.

18 A debtor has a fiduciary duty to maximize the value of the estate for its creditors. *See*  
 19 *Toibb v. Radloff*, 501 U.S. 157, 163, 111 S. Ct. 2197, 115 L. Ed. 2d 145 (1991) (recognizing that  
 20 the Bankruptcy Code's general policy is "maximizing the value of the bankruptcy estate"); *In re*  
 21 *Northwest Airlines Corp.*, 349 B.R. 338, 369 (S.D.N.Y. 2006), *aff'd*, 483 F.3d 160 (2d Cir. 2007)  
 22 ("[t]he debtor-in-possession is a fiduciary, obligated to maximize the value of the estate, treat all  
 23 parties to the case fairly, and protect and conserve the debtor's property"); *In re An-Tze Cheng*,  
 24 308 B.R. 448, 455 (B.A.P. 9th Cir. 2004) (debtor-in-possession "is saddled with the same  
 25 fiduciary duty as a trustee to maximize the value of the estate available to pay creditors").  
 26 Further, "[t]he Bankruptcy Code recognizes the legitimate interest of creditors, whose money is in

1 the enterprise as much as the debtor's, to have a say in the future of the company." *In re Crescent*  
 2 *Beach Inn, Inc.*, 22 B.R. 155, 160 (Bankr. D. Me. 1982) (citations omitted). Particularly here,  
 3 where Debtor was funded from inception to the present with bondholder money, Debtor has an  
 4 obligation to pursue a plan that maximizes value returned to the 1<sup>st</sup> Tier Bondholders.

5 This Court, along with others in this Circuit, has terminated exclusivity where a debtor  
 6 filed a plan that left creditors out of the money and there existed a viable, alternative plan that  
 7 could provide a greater recovery to a group of creditors. See *In re FX Luxury Las Vegas I, LLC*,  
 8 Case No. 10-17015 (BAM) (Bankr. D. Nev. June 22, 2010) (order terminating exclusivity  
 9 attached hereto as Exhibit A) (terminating exclusivity where debtor filed a "new value" plan); *In*  
 10 *re Freemont Gen. Corp.*, Case No. 08-13421 (EAS) (Bankr. C.D. Cal. July 16, 2009) (order  
 11 attached hereto as Exhibit B) (terminating exclusivity period where debtor's stand-alone plan was  
 12 filed on exclusivity expiration date and provided for retention of interests of equity holders  
 13 without providing full recovery to unsecured creditors).

14 In direct contravention of Debtor's fiduciary obligation, the Plan seeks to impermissibly  
 15 amend the Financing Agreement in order to hoard Net Project Revenues that would otherwise be  
 16 available to the 1<sup>st</sup> Tier Bondholders. As noted above, Debtor estimates that it will have  
 17 approximately \$26.6 million cash on hand (presumably to use for capital expenditures or airport  
 18 expansion efforts) after completing its *de minimis* distribution to the 1<sup>st</sup> Tier Bondholders. The  
 19 Plan not only gives the Debtor's management free rein with respect to use of the \$26.6 million,  
 20 but also prevents the 1<sup>st</sup> Tier Bondholders from realizing any upside value if, as may well be the  
 21 case, there is substantial value after 2019 justifying expenditure of some portion of Net Project  
 22 Revenues for capital expenditures. The Indenture Trustee and the Majority 1<sup>st</sup> Tier Bondholders  
 23 should be permitted to propose an alternative plan that distributes more value to Debtor's creditors  
 24 in compliance with the Bankruptcy Code and the express terms of the existing Financing  
 25 Agreement and Senior Indenture.

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#### **D. The Plan Is Patently Unconfirmable**

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Because the overarching consideration in Chapter 11 is how to resolve the case, a lack of a viable plan can be determinative in terminating the debtor's exclusivity period. *See In re Texaco, Inc.*, 81 B.R. 806, 812-13 (Bankr. S.D.N.Y. 1988) (proposing an unconfirmable plan constitutes "cause" under Section 1121(d)); *In re Davis*, 262 B.R. 791 (Bankr. D. Ariz. 2001) (refusing to extend exclusivity in light of unconfirmable plan the debtor proposed); *In re Situation Mgmt. Sys., Inc.*, 252 B.R. 859, 863 (Bankr. D. Mass. 2000) (the "debtor's use of exclusivity period to force creditors to accept an unsatisfactory or unconfirmable plan" constitutes "cause").

10

Here, the Debtor has proposed a Plan that cannot be confirmed as a matter of law.

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Highlighted below are some (but not all) of the Plan's confirmation defects, which weigh in favor of terminating exclusivity.<sup>6</sup>

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#### **1. The Plan Artificially Impairs the General Unsecured Claims, Unfairly Discriminates Against Bondholders and Impermissibly Gerrymanders the Classes**

The Plan provides for vastly different treatment of the two classes of unsecured claims: the 1<sup>st</sup> Tier Bond Unsecured Claims receive an \$11 million Additional Payment Obligation Note on account of the estimated \$445 million unsecured deficiency claim (a 2.5% distribution), while General Unsecured Claims receive their pro rata share of a \$175,000 cash pool (an 80% - 100% distribution, depending on the ultimate size of the claims pool).

The Debtor is well aware that the Majority 1<sup>st</sup> Tier Bondholders will reject the Plan and thus, the Debtor has separately classified a minimal amount of unsecured claims in order to create an impaired consenting class. This classification and treatment of "General Unsecured Claims" creates three major confirmation issues. First, this class is artificially impaired. Under the Debtor's own estimates, the General Unsecured Claims are receiving anywhere from \$0 to

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<sup>6</sup> This discussion is merely intended to highlight some of the many confirmation hurdles Debtor fails to meet. The Indenture Trustee and the Majority 1<sup>st</sup> Tier Bondholders reserve their rights to raise other issues in connection with further briefing and proceedings on the Disclosure Statement and Plan.

\$25,000 less in total than would be necessary to pay them in full – a pittance in a case of this magnitude. *See In re Fur Creations by Varriale, Ltd.*, 188 B.R. 754, 760 (Bankr. S.D.N.Y. 1995) (deferral of payment of \$2,370 claim is artificial impairment where debtors have resources to pay claim in full); *In re N. Washington Ctr. Ltd. P'ship*, 165 B.R. 805, 810 (Bankr. D. Md. 1994) (finding debtor had artificially impaired class for purpose of securing acceptance by one impaired class where it proposed to pay creditors 80% of their claims, but had “absolutely no reason for this impaired treatment, and could pay the creditors 100% of their claims”).

Second, the Plan unfairly discriminates among unsecured claims in violation of § 1129(b)(2). *See In re Ambanc La Mesa Ltd. Partnership*, 115 F.3d 650, 656-57 (9<sup>th</sup> Cir. 1997). To be “fair,” discriminatory treatment among classes of claims of the same priority must (1) have a reasonable basis, (2) be necessary to plan confirmation, (3) be proposed in good faith, and (4) be reasonable in light of its rationale. *Id.* Here, the Debtor seeks to make a 2.5% distribution on account of the 1<sup>st</sup> Tier Bondholders’ unsecured deficiency claim and a 80% - 100% distribution on account of the “other” general unsecured claims. There is no reasonable or rationale basis to provide for such disparate treatment among these creditors.

Third, the Plan impermissibly gerrymanders by creating a separate class of general unsecured claims that are paid far better than other unsecured claims (including the 1<sup>st</sup> Tier Bondholders’ deficiency claims, as well as the 2<sup>nd</sup> and 3<sup>rd</sup> Tier Bond claims) in order to obtain an impaired accepting class. This is blatant gerrymandering, and should not be permitted. *See e.g. In re Barakat*, 99 F.3d 1520, 1525 (9th Cir. 1996) (“Although noting that similar claims may be placed in different classes, the court in *Greystone* found that ‘[there is] one clear rule that emerges from otherwise muddled case law on § 1122 claims classification: thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization Plan.’” (quoting *In re Greystone III Joint Venture*, 995 F.2d 1274, 1279-80 (5th Cir. 1991) (unless there is a business necessity for differing treatment, separate classification is “specious”)); *accord, e.g.,* 7 COLLIER ON BANKRUPTCY ¶ 1100.09[2][a] (15th Ed. Rev. 2009) (“there must be a good business

1 reason or distinct voting interest to justify separate classification") and ¶ 1122.03[6] (noting to  
 2 justify separate classification there must be a reason independent of the desire to secure an  
 3 affirmative vote from an impaired class).

4 **2. The Plan Seeks to Cram Down the Secured Creditors While Taking Their  
 5 Collateral**

6 In order to confirm the Plan, the Debtor must seek to cram down the 1<sup>st</sup> Tier Bondholders,  
 7 and for the reasons briefly described herein, among others, the Debtor cannot do so. Importantly,  
 8 a cram-down plan cannot be confirmed unless it allows a secured creditor to retain its collateral  
 9 or receive deferred cash payments totaling the allowed amount of its claim. 11 U.S.C. §  
 10 1129(b)(2)(A)(i)(I). The Plan does not do that. As the Court has ruled, the prepetition collateral  
 11 securing the 1<sup>st</sup> Tier Bondholders' claim consists of bank accounts held by the Indenture Trustee,  
 12 Net Project Revenues, and contract rights under the Franchise Agreement. *In re Las Vegas*  
 13 *Monorail Co.*, 429 B.R. 317, 338, 346 (Bankr. D. Nev. 2010). Additionally, the Court ruled that  
 14 the Indenture Trustee's statutory lien (N.R.S. § 349.620) attached to Net Project Revenues. *Id.* at  
 15 345. Crucially, that statutory lien is not cut off by Section 552 of the Bankruptcy Code and  
 16 continues throughout the bankruptcy case to secure all of the 1<sup>st</sup> Tier Bondholders' claims. *Id.* at  
 17 329.

18 The Debtor projects that it will have approximately \$26.6 million in cash on hand in 2019  
 19 after paying operating costs, the proposed \$7.5 million note for the 1<sup>st</sup> Tier Bondholders' secured  
 20 claim, and the \$11 million note for the 1<sup>st</sup> Tier Bondholders' unsecured deficiency claim. *See*  
 21 Proposed Disclosure Statement [DE 517-1] p. 126 (final page). The fact that these additional  
 22 funds will exist *after* payment of operating expenses (as defined under the Senior Indenture), and  
 23 yet will not be paid to bondholders, indicates that Debtor is dramatically undervaluing the 1<sup>st</sup> Tier  
 24 Bondholders' Net Project Revenue collateral – by at least \$26.6 million plus the value of the \$11  
 25 million "allocated" to the 1<sup>st</sup> Tier Bondholders' deficiency claim. No replacement collateral or  
 26

1 payment is offered to compensate the 1<sup>st</sup> Tier Bondholders for this loss, in clear violation of  
 2 Section 1129(b)(2)(A)(i)(I) of the Bankruptcy Code.

3 In addition, the Debtor's proposed re-crafting of the Financing Agreement expressly  
 4 reduces the Indenture Trustee's collateral, as well as reduces the ultimate return to the secured  
 5 bondholders, in violation of § 1129(b)(2)(A)(i)(I). Under the terms of the existing documents,  
 6 Debtor is obligated to hold all bank accounts at Wells Fargo Bank, N.A., which means the funds  
 7 are subject to a right of setoff, as well as the continued UCC security interest in bank accounts at  
 8 Wells Fargo and any others that are recognized by the Court's prior ruling and the Indenture  
 9 Trustee's statutory lien rights are protected. Additionally, the Indenture Trustee is entitled to have  
 10 its Administrative Expenses satisfied out of the O&M Costs.

11 The Plan erodes these rights in multiple respects. First, not only does the Debtor intend to  
 12 keep over \$26.6 million of Net Project Revenues, but there is no obligation in the Plan to hold the  
 13 Debtor's funds at Wells Fargo Bank, N.A., imperiling the Indenture Trustee's rights to that money  
 14 upon a default, as provided by the Senior Indenture. Second, the Plan imperils the Indenture  
 15 Trustee's statutory lien by exposing the funds to the right of setoff or at least a priority fight with  
 16 whatever bank the Debtor uses to hold the money. Third, the Debtor has removed the Indenture  
 17 Trustee's Administrative Expenses from its new Plan definition of O&M Costs, and limited the  
 18 Indenture Trustee to fees or other payments relating to its new Plan note. This means even less of  
 19 the \$7.5 million proposed Debtor payment on the secured claim would find its way to the 1<sup>st</sup> Tier  
 20 Bondholders, as such administrative expenses would be withdrawn from payments under that note  
 21 before distributions to bondholders. This is clearly impermissible under the terms of the  
 22 documents; the Indenture Trustee is entitled to be paid first on its legal fees incurred during the  
 23 case out of Project Revenues, whether or not such claims are classified as "administrative  
 24 expenses." Senior Indenture § 7.03.

25 Finally, the Debtor proposes to re-define "Net Project Revenues," although it only  
 26 promises to reveal that definition in some future filing. *See* Plan at 1.1.72 (definition of Net

1 Project Revenues is “[a]s will be defined in the Amended and Restated Financing Agreement.”).  
 2 If permitted to re-define Net Project Revenues, the Debtor would be attempting to re-write the  
 3 statutory lien to take the Indenture Trustee’s collateral. The Debtor cannot unilaterally re-write  
 4 such definitions, as any material amendment to the Financing Agreement requires the consent of a  
 5 majority of the 1<sup>st</sup> Tier Bondholders. *See* Section 6.07 and 9.06 of the Senior Indenture.

6 All of this is impermissible. Contrary to the Plan, the Debtor must allow the Indenture  
 7 Trustee and 1<sup>st</sup> Tier Bondholders, as secured creditors, to retain all of their collateral or receive  
 8 deferred cash payments totaling the allowed amount of their claim, if the Debtor seeks to cram-  
 9 down the 1<sup>st</sup> Tier Bondholders. 11 U.S.C. § 1129(b)(2)(A)(i)(I).

### 10 **3. The Plan is Based on an Impossibility**

11 The lynchpin of the Plan is the concept that the Director will amend the Financing  
 12 Agreement and the existing notes that were issued pursuant to it despite objections from 1<sup>st</sup> Tier  
 13 Bondholders. The Debtor does not have the authority to implement this proposal.

14 Section 10.4 of the Financing Agreement provides that the “Agreement and the Notes may  
 15 not be effectively amended, changed, modified, altered or terminated without the written consent  
 16 of the Indenture Trustee, given as provided in the Senior Indenture and the Subordinate  
 17 Indenture.” The Senior Indenture provides that, unless the amendment is immaterial, a majority  
 18 of the 1<sup>st</sup> Tier Bondholders must consent to an amendment to the Financing Agreement. *See*  
 19 Section 6.07 and 9.06 of the Senior Indenture. The Indenture Trustee and the Majority 1st Tier  
 20 Bondholders do not support the terms outlined in the Plan and will not consent to any amendment  
 21 to the Financing Agreement.

22 The proposed amendment to the Financing Agreement deprives the 1<sup>st</sup> Tier Bondholders  
 23 of their tax-exempt investment, reduces their collateral and proposes to force them to bear the  
 24 costs of the Indenture Trustee’s expenses incurred in administering the 1<sup>st</sup> Tier Bonds out of their  
 25 reduced payout under the Plan. *Compare* Plan definition of O&M Expenses [DE 517-1] at 1.1.75  
 26

1 (no such administrative expenses for the Indenture Trustee) *with* Senior Indenture Definition of  
 2 O&M Expenses [DE 13-4] § 1.01 (including such “Administrative Expenses”).

3 In addition to the prohibition contained in Section 10.4 of the Financing Agreement, any  
 4 unilateral modification of the Financing Agreement by the Director would face other hurdles. As  
 5 noted below, the proposed modifications could cause interest on the 1<sup>st</sup> Tier Bonds to lose its tax-  
 6 exempt status and place the Director in direct violation of its covenants to preserve the tax-exempt  
 7 status of the 1<sup>st</sup> Tier Bonds. In addition, the proposed modification would require the Director to  
 8 exercise dominion and control over collateral and contract rights that were previously pledged and  
 9 assigned to the 1<sup>st</sup> Tier Bondholders under the Senior Indenture.

10 **4. The Plan Unnecessarily Jeopardizes the Tax-Exempt Status of the 1<sup>st</sup> Tier  
 11 Bonds.**

12 Under current federal tax law, a significant modification of a tax exempt debt instrument  
 13 (such as the 1<sup>st</sup> Tier Bonds) may be treated as an exchange of the original debt instrument (pre-  
 14 modification) for a new debt instrument (post-modification ), commonly referred to as  
 15 “reissuance.” *U.S. Treas. Reg.* § 1001-3. This issue is pivotal to investors because, absent the  
 16 transaction (*i.e.* the modification) qualifying for an exemption, the reissuance will result in the  
 17 application of the current tax law against the conditions under which the new debt instrument is  
 18 being issued (post-modification). Investors in tax-exempt bonds need reasonable assurance  
 19 concerning the proper treatment of interest income on their bonds in order to avoid unplanned  
 20 federal tax liability. This assurance is usually provided in the form of an unqualified opinion from  
 21 a law firm recognized in the field of municipal tax law.

22 The Plan anticipates several modifications to the Senior Note (*e.g.*, change in the principal  
 23 amount, maturity, and yield), which collectively are economically significant. As such, the  
 24 Internal Revenue Service may have a basis for finding that the Plan results in the “reissuance” of  
 25 the Senior Note and, as consequently, reissuance of the 1<sup>st</sup> Tier Bonds. The risk of such an  
 26 adverse tax determination is unacceptable and unnecessary. With some proper technical guidance

1 early in the process, an alternative plan can eliminate this exposure at a modest cost to the  
 2 Debtor's estate.

3 The Indenture Trustee's Comments expressly addressed the issue of structuring the Plan so  
 4 as to avoid an unintended reissuance of the pre-modification 1<sup>st</sup> Tier Bonds and to anticipate  
 5 compliance for a reissuance of the post-modification 1<sup>st</sup> Tier Bonds through the use of a common  
 6 financing technique known as an "advance refunding". *See Indenture Trustee's Comments -*  
 7 **"RESTRUCTURING OF SERIES 2000 BONDS - SUMMARY OF SIGNIFICANT DEAL**  
 8 **POINTS."** The Debtor completely ignored the Indenture Trustee's Comments regarding debt  
 9 structure.

10 Other courts have recognized the importance of structuring a plan involving municipal  
 11 bonds in a manner that does not affect the tax-exempt status of the bonds. *See, e.g., In re Revere*  
*Copper and Brass Inc.*, 78 B.R. 17, 18-19 (S.D.N.Y. 1987). In lieu of a thoughtful solution to  
 12 legitimate concerns raised in by the Indenture Trustee in good faith, the Debtor simply makes  
 13 repeated references in the Plan and Disclosure Statement to a blanket statement of intent:

14       The treatment afforded the Holders of Class 4 Claims does not affect the rights of the  
 15 Holders of Class 4 Claims or the 1<sup>st</sup> Tier Trustee under the 1<sup>st</sup> and 2<sup>nd</sup> Tier Indenture  
 16 against any party other than the Debtor, and **specifically, is not intended to nor does it:**  
 17 **(i) modify the maturity, the principal or initial denomination amount, or the interest**  
**rate or maturity value of the 1<sup>st</sup> Tier Bonds; (ii) affect or extinguish the exclusion of**  
**interest paid on the 1<sup>st</sup> Tier Bonds (whether paid by the Reorganized Debtor or any**  
**third party) from gross income for federal income tax purposes; or (iii) affect or**  
**diminish any third-party rights to reimbursement or subrogation under the 1<sup>st</sup> and**  
**2<sup>nd</sup> Tier Indenture of 1<sup>st</sup> Tier Bondholders Insurance Policy.**

20 Plan §§ 1.1.28, 5.3.

21       The Debtor's statement of intent is not self effectuating, and the Plan lacks a technically  
 22 sound and detailed "critical path" through the issues at hand. It is apparent from the Debtor's  
 23 filing of the Plan that the Indenture Trustee and Majority 1<sup>st</sup> Tier Bondholders need to be able to  
 24 prepare their own alternative plan of reorganization.

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## 5. The Plan Unnecessarily Adds Confusion To The Claims Process Under the Surety Bond and The Insurance Policy.

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The 1<sup>st</sup> Tier Bonds were issued and sold by the Director as being secured and protected by, among other things, a Surety Bond and an Insurance Policy issued by Ambac. The mechanics (*i.e.*, preconditions and documentation) for making a claim or draw against the Surety Bond and the Insurance Policy are set forth in such instruments as supplemented by the Senior Indenture. In making a decision to purchase the 1<sup>st</sup> Tier Bonds, investors looked to the Insurance Policy (as supplemented by the Surety Bond) to assure payment of the aggregate total of the entire outstanding principal amount of and all interest to accrue on the 1<sup>st</sup> Tier Bonds (the “Aggregate Insured Amount”). The premium paid by the Debtor for the Insurance Policy was based on the Aggregate Insured Amount. The 1<sup>st</sup> Tier Bondholders have an unqualified claim to recovery against Ambac for the unpaid portion by the Surety Bond and the Aggregate Insured Amount.

As a threshold matter, any plan that will move this case forward must avoid creating any challenges in the suretyship relationship between the 1<sup>st</sup> Tier Bondholders and Ambac, especially in view of the uncertainty invoked by the pending Segregated Account Rehabilitation Proceedings before the Circuit Court of Dane County, Wisconsin. The Indenture Trustee’s Comments spoke to this issue in clear, unambiguous terms, with suggestions to avoid risk to the 1<sup>st</sup> Tier Bondholders.

In response, the Debtor chose to ignore the Indenture Trustee and the fundamentals of conduit financing and processes called for by the Senior Indenture. The Plan, instead, focuses on modifying the trust estate under the Senior Indenture without any thoughtful regard as to the impact of proposed modifications. Rather than structuring its Plan to address the problems, the Debtor provided in the Plan that the “1<sup>st</sup> Tier Note shall be extinguished and discharged and the Amended and Restated Financing Agreement shall provide for the liabilities and obligations arising under the Amended and Restated 1<sup>st</sup> Tier Note, and shall not provide for any liabilities or

1 obligations regarding the 1<sup>st</sup> Tier Bond Claims or the 1<sup>st</sup> Tier Notes.” [DE 516 ¶ 5.2 (p. 13)]  
 2 (emphasis added).

3 The prospect of the extinguishment and discharge of the 1<sup>st</sup> Tier Note (the source of  
 4 conduit payments on the 1<sup>st</sup> Tier Bonds) is alarming. In lieu of a thoughtful solution to the  
 5 legitimate concerns raised by the Indenture Trustee in good faith, the Debtor simply made a  
 6 blanket statement of its intent not to affect third party rights. The Debtor’s intent is not enough.  
 7 The Debtor has declined to work with the Indenture Trustee and Majority 1<sup>st</sup> Tier Bondholders to  
 8 prepare a reorganization plan that protects the interests of its stakeholders.

## 9       **6. Other Confirmation Issues**

10      In addition to the issues described above, the Plan is unconfirmable for a variety of other  
 11 reasons, including:

- 12      • The Plan was not proposed in good faith. *See* 11 U.S.C. 1129(a)(3). As noted above, the  
        Plan is a placeholder plan used to exercise leverage over Debtor’s creditors in  
        negotiations; and
- 14      • The Plan violates the “best interest of creditors” test. *See* 11 U.S.C. 1129(a)(7). The  
        liquidation analysis attached to the proposed Disclosure Statement provides that in a  
        liquidation scenario, the 1<sup>st</sup> Tier Bondholders’ unsecured claims would receive a 1.2%  
        distribution (versus the 2.5% distribution under the Plan). The Indenture Trustee and the  
        Majority 1<sup>st</sup> Tier Bondholders strongly dispute this valuation and believe they would  
        receive more if the company were sold.
- 18      • The Plan is not feasible, especially if the class of 1<sup>st</sup> Tier Bondholders exercise Section  
        1111(b) rights. 11 U.S.C. §§ 1111(b)(2)(B)(i); 1129(b)(2)(A)(i)(II); *In re Weinstein*, 227  
        B.R. 284, 291-96 (9<sup>th</sup> Cir. BAP 1998) (generally discussing the contours of Section  
        1111(b) and the effect of its election).
- 20      • Even if the Court were to find that the absolute priority rule does not apply because Debtor  
        is a non-profit corporation, the Plan does not meet the fair and equitable standards for  
        cram-down under Section 1129(b). Both *Matter of Wabash Valley Power Ass’n, Inc.*, 72  
        F.3d 1305 (7th Cir. 1995) and *In re Gen. Teamsters, Warehousemen & Helpers Union*,  
        Local 890, 265 F.3d 869 (9th Cir. 2001) require Debtor to show find that there is no better  
        option for rejecting unsecured creditors, which it clearly cannot do with this Plan.

## 24       **E.       Terminating Exclusivity Does Not Prejudice Debtor**

25      Here, there is no prejudice to the Debtor if exclusivity is terminated. Courts have  
 26 previously noted that terminating exclusivity “does not sound a death knell for [a] debtor’s

1 reorganization.” *In re All Seasons Indus., Inc.*, 121 B.R. 1002, 1005 (Bankr. N.D. Ind. 1990). It  
2 only permits creditors to file their own plan while the debtor is free to pursue its own plan. *Id.*

3 Permitting creditors to propose an alternative plan now benefits the entire estate. The  
4 Debtor’s disclosure statement outlines the negative consequences of prolonging this case,  
5 including loss of customer confidence, inability to attract and retain management and incurrence  
6 of significant professional fees and other expenses associated with the bankruptcy case. *See*  
7 proposed Disclosure Statement at 54:24-55:9. Pushing forward with the Plan will only exacerbate  
8 the harms the Debtor seeks to avoid. The way to alleviate prolonging this case is to allow  
9 creditors to consider all possible options at once.

10 As courts have recognized, terminating exclusivity also fosters a quicker resolution of  
11 bankruptcy proceedings by facilitating settlement. *In re EUA Power Corp.*, 130 B.R. 118, 119  
12 (Bankr. D. N.H. 1991) (“It may well be, as has been the experience in cases not only in this Court  
13 but in other courts, that while the process starts out after termination of exclusivity with  
14 competing Plans the ongoing progress of the case results in compromises and negotiations  
15 whereby one joint Plan goes forward.”); *In re Mother Hubbard, Inc.*, 152 B.R. 189, 195 (Bankr.  
16 W.D. Mich. 1993) (“In some instances, authority to file a competing Plan may additionally  
17 motivate the debtor to more earnestly negotiate an acceptable consensual Plan.”). It is the  
18 Movants’ hope that terminating exclusivity will facilitate continued negotiations and resolution of  
19 these issues either with Debtor or a Chapter 11 trustee, or through a competing plan.

20 **Conclusion**

21 After eight months in bankruptcy and the incurrence of Debtor professional fees exceeding  
22 \$2.5 million, the Debtor has proposed a Plan that reflects no meaningful negotiation, that is  
23 adamantly opposed by the Debtor’s only substantial economic stakeholders (creditors that hold  
24 more than 99% of all claims entitled to vote), and that is unconfirmable on its face. These facts  
25 constitute more than sufficient cause to terminate exclusivity and to permit the 1<sup>st</sup> Tier  
26 Bondholders to file a competing plan.

1 Dated: September 9 , 2010.

2 **LEWIS AND ROCA LLP**

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/s/ Susan M. Freeman (AZ 004199)

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1 PROOF OF SERVICE

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